

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS**

BLUE SKIES ALLIANCE, *et al.*,

Plaintiffs,

v.

and STEPHEN L. JOHNSON,
as Administrator of the United States
Environmental Protection Agency, *et al.*,

Defendants.

Civil Action No.
3:04-CIV-2169-N

**EPA'S NOTICE OF LODGING
OF PROPOSED CONSENT DECREE**

Defendant Stephen L. Johnson, Administrator of the United States Environmental Protection Agency ("EPA"), with this notice lodges with the Court a proposed consent decree.

The proposed consent decree which Defendant lodges today should not be signed or entered by the Court at this time. Pursuant to section 113(g) of the Clean Air Act, 42 U.S.C. § 7413(g), the consent decree is not final and cannot be entered by the Court until the EPA Administrator provides "a reasonable opportunity by notice in the Federal Register to persons who are not named as parties or intervenors to the action" to comment in writing upon the proposed decree. After a reasonable public comment period, the EPA Administrator must promptly consider any written comments received. *Id.* If none of the comments disclose facts or considerations which indicate that the decree is inappropriate, improper, inadequate or inconsistent with the requirements of the Clean Air Act, the Administrator will request the Court to enter the decree. *Id.*

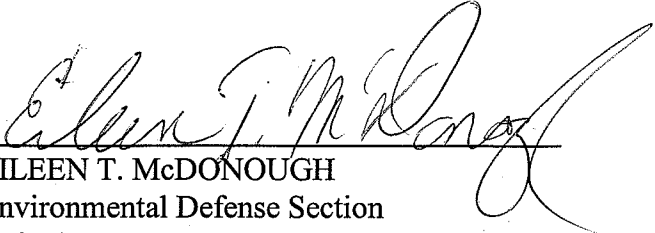
Respectfully submitted,

KELLY A. JOHNSON
Acting Assistant Attorney General
Environment and Natural Resources Division

Of Counsel:

Jan Tierney
U.S. Environmental Protection Agency
Office of General Counsel
Ariel Rios Building - North
1200 Pennsylvania Ave., NW
Washington, DC 20460
telephone: (202) 564-5598
fax: (202) 564-5603
tierney.jan@epa.gov

Suzanne J. Smith-Roquemore
United States Environmental Protection Agency
Region VI
Office of Regional Counsel
1445 Ross Avenue, Suite 1200
Dallas, TX 75202-2733
telephone: (214) 665-8027
fax: (214) 665-2182
smith-roquemore.suzanne@epa.gov



EILEEN T. McDONOUGH
Environmental Defense Section
United States Department of Justice
Post Office Box 23986
Washington, D.C. 20026-3986
telephone: (202) 514-3126
fax: (202) 514-8865
eileen.mcdonough@usdoj.gov

May 4, 2005

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS**

BLUE SKIES ALLIANCE, *et al.*,

Plaintiffs,

v.

STEPHEN L. JOHNSON, as
Administrator of the United States
Environmental Protection Agency, *et al.*,

Defendants.

Civil Action No.
3:04-CIV-2169-N

CONSENT DECREE

WHEREAS, Plaintiffs Blue Skies Alliance, Downwinders at Risk, Public Citizen, and Sierra Club (collectively "Blue Skies"), filed the complaint in this action on October 1, 2004, against Defendants Stephen L. Johnson, Administrator of the United States Environmental Protection Agency; Richard Greene, Administrator, Region 6; and the United States Environmental Protection Agency (collectively "EPA");

WHEREAS, Blue Skies' complaint alleges that EPA has failed to perform a nondiscretionary duty pursuant to section 181(b)(2) of the Clean Air Act ("CAA"), 42 U.S.C. § 7511(b)(2) to determine whether the Dallas/Ft. Worth ozone nonattainment area ("DFW") had attained the one-hour national ambient air quality standard for ozone by the applicable statutory attainment date;

WHEREAS, the complaint further alleges that EPA has failed to perform a nondiscretionary duty pursuant to CAA section 110(k)(2), 42 U.S.C. § 7410(k)(2), to take final action by the statutory deadline on two state implementation plan ("SIP") revisions for DFW submitted by the Texas Council of Environmental Quality ("TCEQ") to EPA in April 2000;

WHEREAS, Blue Skies seeks an order from this Court establishing a deadline by which EPA must complete these allegedly mandatory duties;

WHEREAS, Blue Skies and EPA (jointly referred to as "the Parties") agree that this Court has jurisdiction under the citizen suit provision of the Clean Air Act, 42 U.S.C. § 7604(a);

WHEREAS, the Parties seek to effect a settlement of this Action without expensive and protracted litigation;

WHEREAS, the Parties have agreed to a settlement of this Action without any admission or adjudication of fact or law;

WHEREAS, the Parties agree that this settlement represents a good faith compromise of disputed claims;

NOW THEREFORE, before the taking of testimony, without trial or determination of any issue of fact or law, and upon the consent of the Parties, it is hereby ordered, adjudged, and decreed that:

DEFINITION

1. For the purposes of this Consent Decree, the following terms shall have the following meaning:

a. "TERP" shall mean the Texas Emission Reduction Plan SIP revision for which TCEQ adopted rules on August 22, 2001;

b. "VMEP" shall mean the Voluntary Mobile Source Emission Reduction Program SIP revision submitted by TCEQ to EPA on April 25, 2000 (*See* 66 Fed. Reg. 4756, 4760 (2001)); and

c. "TCM" shall mean the Transportation Control Measures SIP revision submitted by TCEQ to EPA on April 25, 2000 (*See* 66 Fed. Reg. 4756, 4761 (2001)).

EPA OBLIGATIONS

2. No later than December 1, 2005, EPA shall sign for publication in the Federal Register a notice(s) of final rulemaking to approve or disapprove, in whole or in part, the TERP, VMEP, and TCM SIP submissions. EPA shall promptly deliver the notice(s) to the Office of the Federal Register for publication. EPA shall make a copy of the notice(s) of rulemaking available to Blue Skies within five business days following signature.

MODIFICATION OF THIS DECREE

3. Any dates set forth in the Consent Decree may be extended by written agreement of the parties and notice to the Court. To the extent the parties are not able to agree to an extension, EPA may seek a modification of this Consent Decree in accordance with the procedures specified below.

(a) If EPA files a motion requesting modification of a date or dates established by this Consent Decree totaling more than thirty (30) days and provides notice to the Plaintiffs at least thirty (30) days prior to filing such motion, and files the motion at least sixty (60) days prior to the date for which modification is sought, then the filing of such motion shall, upon request, automatically extend the date for which modification is sought. Such automatic extension shall remain in effect until the earlier to occur of (i) a dispositive ruling by this Court on such motion, or (ii) the date sought in such motion. EPA may move the Court for a longer extension.

(b) If EPA files a motion requesting modification of a date or dates established by this Consent Decree totaling thirty (30) days or less, provides notice to the Plaintiffs at least fifteen (15) days prior to the filing of such motion, and files the motion at least seven (7) days prior to the date for which modification is sought, then the filing of such motion shall, upon request, automatically extend the date for which modification is sought. Such extension shall remain in effect until the earlier to occur of (i) a dispositive ruling by the Court on such motion, or (ii) the date sought in the modification.

(c) If EPA does not provide notice pursuant to subparagraphs 3(a) or 3(b) above, EPA may move the Court for a stay of the date for which modification is sought. EPA shall give notice to the Plaintiffs as soon as reasonably possible of its intent to seek a modification and/or stay of the date sought to be modified.

(d) If the Court denies a motion by EPA to modify a date established by this Consent Decree, then the date for performance for which modification has been requested shall be such date as the Court may specify.

(e) Any motion to modify the schedule established in this Consent Decree shall be accompanied by a motion for expedited consideration. The parties to this Consent Decree shall join in any such motion for expedited consideration.

4. This Consent Decree may be modified by written agreement of the parties and approval of the Court. Nothing in this Consent Decree or in the parties' agreement to its terms, shall be construed to limit the equitable powers of the Court to modify those terms upon a showing of good cause by any party.

CONTINUING JURISDICTION AND TERMINATION

5. The Court shall retain jurisdiction only to effectuate compliance with this Consent Decree and to consider any requests for costs of litigation (including attorney's fees) pursuant to CAA section 304(d), 42 U.S.C. § 7604(d). When EPA has discharged its obligations under paragraph 2 above and the relevant notice(s) has/have been published in the Federal Register, then this case shall be dismissed with prejudice.

SAVINGS PROVISIONS

6. The obligations imposed by EPA under Paragraph 2 of this Consent Decree can only be undertaken using appropriated funds. No provision of this Decree shall be interpreted as or constitute a commitment or requirement that EPA obligate or pay funds in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341, or any other applicable federal statute.

7. Nothing in this Consent Decree shall be considered to limit or modify any discretion EPA may have to alter, amend, or revise the actions taken pursuant to Paragraph 2 of this Consent Decree.

8. Nothing in the terms of this Decree shall be construed to limit or modify the discretion accorded EPA by the Clean Air Act or by general principles of administrative law in taking the actions referred to in Paragraph 2.

9. Nothing in the terms of this Consent Decree shall be construed either (a) to confer upon this Court jurisdiction to review any issues that are within the exclusive jurisdiction of the United States Courts of Appeals under section 307(b)(1) of the Clean Air Act, 42 U.S.C. § 7607(b)(1), or (b) to waive any remedies plaintiffs may have under section 307(b)(1), 42 U.S.C. § 7607(b)(1). Nothing in the terms of this Decree shall be construed to confer upon the district court jurisdiction to review any decision, either procedural or substantive, to be made by EPA pursuant to this Decree, except for the purpose of determining EPA's compliance with this Decree.

ATTORNEY FEES AND COSTS

10. The Parties agree that an award to Blue Skies of costs of litigation (including attorneys' fees) pursuant to CAA section 304(d), 42 U.S.C. § 7604(d), is appropriate. Blue Skies is entitled to such an award in an amount to be determined either by settlement or by the Court. The deadline for filing a motion for costs of litigation (including attorney's fees) for activities performed prior to entry of this Consent Decree in this case is hereby extended until 120 days after entry of this Consent Decree by the Court. During this time the parties shall seek to resolve informally any claim for costs of litigation (including attorney's fees), and if they cannot, will submit that issue to the Court for resolution. The Court shall retain jurisdiction to resolve any request for costs of litigation (including attorney's fees), notwithstanding any dismissal pursuant to paragraph 5 above.

RECIPIENTS OF NOTIFICATION

11. Any notices required or provided for by this Decree shall be in writing, effective upon receipt, and sent to the following:

For Plaintiff:

MARC S. CHYTILO
Law Office of Marc Chytilo
1505 Mission Canyon Road
Santa Barbara, CA 93105
telephone: (805) 682-0585
email: airlaw5@cox.net

For Defendants:

Suzanne J. Smith-Roquemore
United States Environmental Protection Agency
Region VI
Office of Regional Counsel
1445 Ross Avenue, Suite 1200
Dallas, TX 75202-2733
telephone: (214) 665-8027
email: smith-roquemore.suzanne@epa.gov

Jan M. Tierney, Attorney,
Air and Radiation Law Office
Office of General Counsel
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., N.W.
Washington, D.C. 20460
telephone: (214) 564-5598
email: tierney.jan@epa.gov

Chief
Environmental Defense Section
Environment and Natural Resources Division
United States Department of Justice
P.O. Box 23986
Washington, D.C. 20026-3986
telephone: (202) 514-2219
Attn: DJ # 90-5-2-4-16726

or such other person as either party may subsequently identify in writing to the other party.

SECTION 113(g)

12. The Parties agree and acknowledge that before this Consent Decree can be finalized and entered by the Court, EPA must provide notice in the Federal Register and an opportunity for comment pursuant to Clean Air Act section 113(g), 42 U.S.C. § 7413(g). EPA will expeditiously prepare such notice and forward it to the Office of Federal Register after lodging the draft Consent Decree with the Court. After this Consent Decree has undergone an opportunity for notice and comment, the Administrator and/or the Attorney General, as appropriate, shall promptly consider any such written comments in determining whether to withdraw or withhold consent to this Consent Decree, in accordance with section 113(g) of the Clean Air Act. If the federal government elects not to withdraw or withhold consent to this Consent Decree, the parties shall promptly file a motion that requests the Court to enter this Consent Decree.

SIGNATURE OF PARTIES

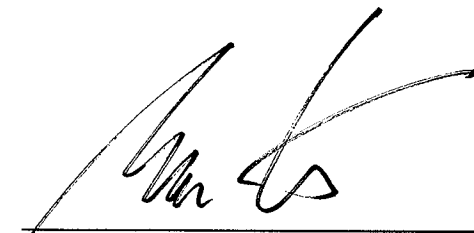
13. The undersigned representatives of each party certify that they are fully authorized by the party or parties they represent to consent to the Court's entry of the terms and conditions of this Consent Decree.

SO ORDERED this ____ day of _____ 2005.

HONORABLE JERRY BUCHMEYER
UNITED STATES DISTRICT JUDGE

SO AGREED:

For Plaintiffs



MARC S. CHYTILO

Law Office of Marc Chytilo
1505 Mission Canyon Road
Santa Barbara, CA 93105
Telephone: (805) 682-0585
Fax: (805) 682-2379
Email: airlaw5@cox.net

Dated: May 2, 2005

For Defendants

KELLY A. JOHNSON

Acting Assistant Attorney General
Environment and Natural Resources Division



EILEEN T. McDONOUGH

Environmental Defense Section
United States Department of Justice
Post Office Box 23986
Washington, D.C. 20026-3986
telephone: (202) 514-3126
fax: (202) 514-8865
eileen.mcdonough@usdoj.gov

Dated: May 4, 2005

JAN M. TIERNEY

U.S. Environmental Protection Agency
Office of General Counsel
Ariel Rios Building - North
1200 Pennsylvania Ave., NW
Washington, DC 20460
telephone: (202) 564-5598
fax: (202) 564-5603
tierney.jan@epa.gov

Suzanne J. Smith-Roquemore

U.S. Environmental Protection Agency, Region VI
Office of Regional Counsel
1445 Ross Avenue, Suite 1200
Dallas, TX 75202-2733
telephone: (214) 665-8027
fax: (214) 665-2182
smith-roquemore.suzanne@epa.gov

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served by first-class mail, postage prepaid, on May 4, 2005, upon:

Marc S. Chytilo
Law Office of Marc Chytilo
1505 Mission Canyon Rd
Santa Barbara, CA 93105
805/682-0585
Email: airlaw5@cox.net

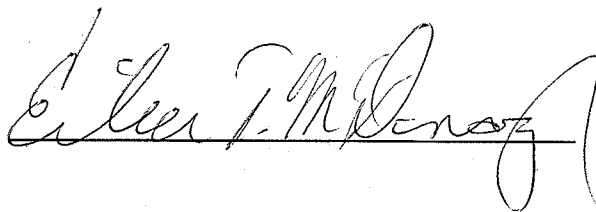
Van H. Beckwith
Matthew Kuryla
Baker Botts - Dallas
2001 Ross Ave
Suite 600
Dallas, TX 75201-2980
214/953-6505
Fax: 214/661-4505 FAX
Email: van.beckwith@bakerbotts.com

Gary E. Zausmer
Jenkins & Gilchrist
One American Center
600 Congress Ave
Suite 2200
Austin, TX 78701
512/499-3800
Fax: 512/404-3520 FAX

Gregg A. Cooke
Guida Slavich & Flores
5949 Sherry Ln
Suite 1150
Dallas, TX 75225
214/692-0009

Jane E. Atwood
Office of the Texas Attorney General
PO Box 12548
Austin, TX 78711-2548
512/463-2012
Email: jane.atwood@oag.state.tx.us

R. Lambeth Townsend
Lloyd Gosselink Blevins Rochelle &
Townsend
One Congress Plaza
PO Box 1725
111 Congress Avenue
Suite 1800
Austin, TX 78767
512/322-5800

A handwritten signature in black ink, appearing to read "Ellen T. McDonough", written over a horizontal line.